IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1066-17

THE STATE OF TEXAS

v.

DAI'VONTE E'SHAUN TITUS ROSS, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS BEXAR COUNTY

SLAUGHTER, J., filed a dissenting opinion.

DISSENTING OPINION

I agree with the position taken by Judge Walker in his dissenting opinion, and I join him. The limited question in this case is whether the trial judge erred by granting Appellee's motion to quash, which resulted in dismissal of the information charging Appellee with disorderly conduct due to lack of adequate notice. As correctly identified by the trial court, the court of appeals, and Judge Walker, the disorderly-conduct statute contains ambiguous terms that, when viewed collectively, are so lacking in clarity that an information tracking those terms fails to provide adequate notice to the accused. Those ambiguous terms, as they

pertain to the disorderly-conduct statute, have never before today been clarified by this Court. Thus, at the time Appellee was charged with disorderly conduct, he did not have the benefit of a clarification from this Court of the ambiguous terms,[1] and the State needed to plead the information with more specificity to ensure that he had adequate notice to prepare a defense. *State v. Mays*, 967 S.W.2d 404, 407 (Tex. Crim. App. 1998) ("A statute which uses an undefined term of indeterminate or variable meaning requires more specific pleading in order to notify the defendant of the nature of the charges against him.").[2] Because the State's information merely tracked the statutory language and that language was not "completely descriptive" of the offense, *see id.*, the information did not provide adequate notice of the manner and means by which Appellee allegedly committed disorderly conduct. Accordingly, on that basis, I would affirm the court of appeals and uphold the trial court's ruling on the motion to quash.

Below, I address my disagreement with the Court's analysis on two grounds. First, I disagree with the scope of this Court's analysis, which examines each ambiguous statutory

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[1] As noted by Judge Walker, the Court fails to resolve the question of whether the trial judge's ruling was erroneous based on the law as it existed at the time of the ruling. Because the trial judge back then did not have the benefit of today's analysis, he was left with a statute containing ambiguous terms and an information that merely tracked the statutory language. Therefore, like Judge Walker, I disagree with the Court's decision to apply a post-hoc analysis of the ambiguous statutory terms in reversing the trial court and court of appeals.

[2] *See also Daniels v. State,* 754 S.W.2d 214, 217 (Tex. Crim. App. 1988) (motion to quash is properly granted "where the language in the charging instrument concerning the defendant's conduct is so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed").

term and arrives at a definitive conclusion as to the meaning of those terms. That analysis goes beyond what is necessary to resolve the issue in this case, which asks us to decide only whether the trial judge's ruling dismissing the information was erroneous at the time it was made. Second, with respect to the Court's interpretation of the disorderly-conduct statute, I disagree with that interpretation because it fails to fully resolve an apparent conflict between the disorderly-conduct statute and Texas's recently enacted open-carry law. I address each of these points in turn below.

I. Once the Court found that the information tracking the statutory language was unclear due to the ambiguous statutory terms, the Court should have ended the inquiry and affirmed the lower courts.

The Court's opinion, which reverses the court of appeals and trial court, acknowledges that the terms "calculated" and "alarm" in the disorderly-conduct statute are ambiguous in that they have more than one possible meaning. Finding that there are ambiguous statutory terms that heretofore this Court has not clarified, this should have ended the Court's inquiry and should have resulted in affirming the court of appeals. The Court goes too far in conducting a full analysis of two ambiguous statutory terms, reaching a definitive conclusion on their meaning, and assigning a reasonable-person standard to the statute.

The court of appeals' analysis was limited to holding that the information here tracking the statutory language provided inadequate notice due to the inherent vagueness in the term "alarm." *Ross v. State*, 531 S.W.3d 878, 883 (Tex. App.—San Antonio 2017). The only issues presented to this Court on discretionary review are whether: (1) an information

that tracks the language of section 42.01(a)(8) provides a defendant with sufficient notice that he displayed a firearm in a manner calculated to alarm; (2) the court of appeals erred by applying a First Amendment and Fourteenth Amendment rule to a Sixth Amendment complaint; and (3) the term "alarm" within the context of section 42.01(a)(8) is inherently vague. Ultimately, these three issues all pertain to whether the information charging Appellee with disorderly conduct provided him with sufficient notice of the nature of the charges against him.

In conducting our analysis of this issue, once we determined that there are ambiguous statutory terms that have never before been defined by this Court and that the charging instrument merely tracking the statutory language was not completely descriptive of the offense, we should have ended our inquiry there and held that there was insufficient notice. It is improper in this case with these limited issues for the Court to go beyond a finding of ambiguity to then, for the first time, define the ambiguous statutory terms and hold that, under these newly clarified statutory terms, Appellee was provided with sufficient notice. The Court's opinion correctly quotes *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017), for the proper and limited analysis the Court should have conducted in this case:

> [O]ur notice jurisprudence requires appellate courts to engage in a two-step analysis when analyzing whether a charging instrument provides adequate notice. First, the reviewing court must identify the elements of the offense. Next, it must consider whether the statutory language is sufficiently descriptive of the charged offense.

Maj. Op. at 6, n. 18. The Court further acknowledges in its opinion that when conducting step two of this analysis, if the statute "uses an undefined term of indeterminate or variable meaning," then the charging instrument "requires more specific pleading in order to notify the defendant of the nature of the charges against him." *Id.* at 4-5 (quoting *Mays*, 967 S.W.2d at 407). While the Court quotes from *Zuniga* and *Mays*, it fails to limit its inquiry and analysis as directed in those two cases. Instead, the Court goes beyond a finding of ambiguity to analyze and define those ambiguous statutory terms. Then, after defining these statutory terms *for the first time* as they pertain to the disorderly-conduct statute, the Court holds that pursuant to the definitions determined by the Court *today*, the Appellee and the trial court should have understood those ambiguous terms in the same way in 2016 when the trial court granted the motion to quash. I disagree with the Court's decision to go beyond the scope of the grounds for review and the matters actually decided by the court of appeals to resolve this case. And I further disagree with the Court's decision to reverse the lower courts' judgment here based on a retrospective analysis of the statutory language that is immaterial to the notice issue in this case.

II. The Court's analysis fails to resolve the conflict between the disorderly-conduct statute and the open-carry law.

Not only do I disagree with the Court's scope of inquiry, I also disagree with its interpretation of the disorderly-conduct statute. Specifically, I disagree with the Court's definition of "calculated" as meaning "likely." Relatedly, I also disagree with the Court's assignment of the "reasonable person" standard as to whether an actor, under the disorderly-

conduct statute, intentionally or knowingly displayed a gun in a manner "calculated to alarm." Although the majority opinion concludes that its interpretation of the disorderly-conduct statute resolves any possible conflict with the open-carry statute, in reality, the Court's interpretation potentially encompasses many instances of lawful open carry and thus does little to alleviate concerns regarding a conflict between the two statutes. Because of the possible implications raised by the Court's analysis, even though I believe the Court's analysis goes far beyond the scope of proper inquiry, I feel compelled to address the matters with which I disagree.

Since 2016, Texas's open-carry law has allowed properly-licensed handgun owners to openly carry their firearms in public in a shoulder or belt holster.[3] While Texas is known

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[3] Act of May 29, 2015, 84th Leg., R.S., ch. 437, § 1, 2015 Tex. Gen. Laws 1706 (effective January 1, 2016). Additionally, Texas has long permitted a person to carry a long gun in public without any license.

In 2015, just before the enactment of the open-carry law, Texas prohibited the intentional display of a handgun in public even for concealed handgun license holders. Under Section 46.035 of the Texas Penal Code, in effect in 2015,

> A license holder commits an offense if the license holder carries a handgun on or about the license holder's person . . . and intentionally displays the handgun in plain view of another person in a public place.

TEX. PENAL CODE ANN. § 46.035(a) (West Supp. 2015). As part of the open-carry law, Section 46.035 was amended to create an exception for properly holstered handguns. Thus, the statute now provides,

> A license holder commits an offense if the license holder carries a handgun on or about the license holder's person . . . and intentionally displays the handgun in plain view of another person in a public place. *It is an exception to the application of this subsection that the handgun was partially or wholly visible but was carried in a shoulder or belt holster by the license holder.*

for its many gun enthusiasts, it is common knowledge that many ordinary people, even in Texas, may become alarmed at the sight of a gun in public, regardless of the legal right to openly carry a firearm.[4] This fear at the mere sight of a gun is generally caused by a person's unfamiliarity with guns and the media's extensive coverage of gun violence and gun-control issues. Even if one believes these attitudes towards guns are unfounded, they nevertheless represent the sensibilities of a great number of ordinary Texans. The lawmakers who enacted open carry, being aware of these issues, apparently determined that the risk of public fear was outweighed by the probable benefit of crime deterrence through the presence of law-abiding armed citizens.[5] Given that it is common knowledge that many people fear guns and are

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TEX. PENAL CODE ANN. § 46.035(a) (West 2018) (emphasis added).

Had Appellee committed the alleged offense in 2015 instead of 2016, there would be no issue and no conflict interpreting the disorderly-conduct statute in the manner which the Court's opinion provides. It would be an offense for anyone to intentionally or knowingly display a firearm in public in a way that was likely to cause alarm. But after the enactment of the open-carry law, interpreting the word "calculated" to mean "likely" creates an absurd result by posing a direct conflict with the open-carry law, which plainly permits the open display of firearms, even if doing so is likely to cause alarm to some bystanders.

[4] *See, e.g.,* Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L. J. 1486, 1522 (2014) ("There is little doubt that brandishing a weapon in most situations causes great alarm to the surrounding population."); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1521 (2009) ("In many places, carrying openly is likely to frighten many people[.]"); Reid Golden, Note, *Loaded Questions: A Suggested Constitutional Framework for the Right to Keep and Bear Arms,* 96 MINN. L. REV. 2182, 2210 (2012) (open-carry scheme "may cause alarm in public"). I would also cite to the numerous media articles on the subject, but I believe any reader of this opinion is all too aware of such alarmist and ubiquitous coverage.

[5] The legislative history reflects that supporters of the open-carry bill conceded the existence of "safety concerns" harbored by some, but supporters suggested that such concerns were unfounded

alarmed by the mere sight of a gun, most gun owners are also subjectively aware that many people may become alarmed when they see a gun carried openly in public—holstered or not. This fear in seeing the gun may be temporary, but the disorderly-conduct statute does not place a temporal limit on the "alarm."

Despite acknowledging that the word "calculated" in the disorderly-conduct statute has more than one possible definition, the Court's opinion holds that this word means "likely" in this context. It also holds that the word "alarm" has multiple definitions but in this statute means "to strike with fear" or "frighten." The Court also assigns a reasonable-person standard to the determination of whether an actor's conduct in displaying his firearm is alarming. The statute as written provides that "a person commits an offense if he intentionally or knowingly . . . displays a firearm or other deadly weapon in a public place in a manner calculated to alarm." TEX. PENAL CODE § 42.01(a)(8). Using the Court's definitions and reasonable-person standard, the statute has the following meaning: "a person commits an offense if he intentionally or knowingly . . . displays a firearm or other deadly weapon in a public place in a manner 'likely' to 'strike with fear' or 'frighten' a reasonable

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and were outweighed by the potential positive effects of open carry—namely, a reduction in criminal activity due to the deterrent effect of law-abiding civilians visibly carrying handguns. *See* House Research Organization, Bill Analysis, C.S.H.B. 910, 84th Leg., R.S. (2015). Meanwhile, opponents of the legislation voiced the precise concern at issue in this case—that is, that "openly carrying handguns could create an environment of fear, intimidation, and unnecessary provocation." *Id.* at 7. Although the Texas Legislature apparently weighed these competing interests and determined that the risk of public alarm was outweighed by the other considerations favoring open carry, the Legislature's decision to legalize open carry should not be interpreted as broadly indicating that Texas citizens are not alarmed at the sight of firearms in public.

person." The Court reasons that "linking this objective-likelihood understanding of 'calculated' to the reasonable-person standard greatly reduces [the disorderly-conduct statute's] susceptibility to a vagueness challenge—because compliance with the statute would not turn upon the unknowable, idiosyncratic sensibilities of whoever may be present." *Maj. Op.* at 11. But the Court's interpretation of "calculated" and "alarm" joined with the reasonable-person standard in the disorderly-conduct statute have the opposite effect of what the Court intended.

As discussed more fully below, using "likely" as the definition of "calculated" may have the undesirable result of encompassing within the disorderly-conduct statute many instances of lawfully openly carrying a licensed firearm in public. Assigning the reasonable-person standard to the statute also encompasses lawful open-carry conduct, and ignores the statutory language, which is more properly understood as focusing on the subjective belief of the actor. It additionally creates the problem of encouraging arbitrary and discriminatory enforcement.

A. "Calculated" should be interpreted to mean "deliberately planned" based on the actor's subjective intent rather than "likely" as viewed from the perspective of a reasonable person.

As the Court's opinion acknowledges, there is more than one reasonable way of interpreting this statute. The word "calculated" may mean "likely," as this Court's majority concludes. But "deliberate," "intended," "planned or contrived to accomplish a purpose," and "carefully planned for a particular and often improper purpose" are also reasonable

alternative definitions for "calculated."[6] Because "calculated" has multiple meanings that can impact how the statute is applied, the statute contains an ambiguity. When the statutory language is ambiguous, we may consider extra-textual sources to ascertain the collective intent of the Legislature. *Arteaga v. State*, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017); *Chase v. State*, 448 S.W.3d 6, 11 (Tex. Crim. App. 2014). One such factor is the consequences of a particular construction. *Arteaga*, 521 S.W.3d at 334; *see also* TEX. GOV'T CODE § 311.023(5).[7]

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[6] At the time of the disorderly-conduct statute's enactment in 1973, lawmakers would have probably understood the word "calculated" to mean "carefully thought out or planned," or "planned or contrived to accomplish a purpose; brought about by deliberate intent; likely." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 209 (1967); WEBSTER'S NEW COLLEGIATE DICTIONARY 117-18 (7th ed. 1971). The current version of Webster's New International Dictionary provides the following relevant definitions for "calculated": "planned or contrived so as to accomplish a purpose or achieve an effect: thought out in advance: deliberately planned"; "brought about or brought into existence as a consequence of deliberate intent and planning"; or "likely—used with complementary infinitive." WEBSTER'S NEW INTERNATIONAL DICTIONARY 315 (3d. ed. 2002).

[7] Although the legislative history is another extra-textual factor we may consider, it is largely unhelpful in resolving this particular issue. The law governing disorderly conduct has been in existence in Texas in one form or another for well over 100 years. Prior to the reformation and adoption of the 1974 Penal Code, the offense was known as "Disturbance of the Peace." *See* 1911 TEX. PENAL CODE, art. 470. Under the 1911 Penal Code, the law provided, in relevant part, that a person committed an offense if he went "into or near any public place, or into or near any private house, and . . . . rudely display[ed] any pistol or other deadly weapon, in a manner calculated to disturb the inhabitants of such public place or private house[.]" *Id.* When the Penal Code was modernized in 1974, the relevant portion of the statute was enacted in its current form, making it an offense to display a firearm in public "in a manner calculated to alarm." TEX. PENAL CODE ANN. § 42.01(a)(8) (West 2018). Given the origin of this statute, it is apparent that the Legislature's use of the word "calculated" in this context was derived from the "Disturbance of the Peace" law that preceded the modern penal code. In view of the relative lack of informative legislative history, and where, as here, there has been a significant recent change in the law, namely the enactment of the open-carry law, that impacts the application of this statute, the most important factor to examine is the consequences of a particular construction.

Here, the proof required to establish the offense of disorderly conduct varies significantly depending on the manner in which the word "calculated" is understood. If it means "likely," and using the Court's definition of "alarm" and the reasonable-person standard, then the statute merely requires proof that the defendant intentionally or knowingly displayed a firearm in a public place in a manner that he knew was likely to frighten an ordinary person. Using the reasonable-person standard shifts the inquiry from whether the actor subjectively believed his actions would alarm the target audience to whether a reasonable person would be stricken with fear as a result of the actor's display of a firearm. Thus, displaying a gun in a manner "likely" to alarm necessitates a determination of whether a reasonable person would be alarmed in that situation. A judge or jury could easily find that a reasonable person would be alarmed by seeing a gun openly displayed in public in a holster on someone's hip. Thus, there is a good possibility that a person who is lawfully openly carrying a weapon could be convicted of disorderly conduct for "display[ing] a firearm . . . in a public place in a manner [likely] to [frighten]" a reasonable, ordinary citizen—even if he did not subjectively intend to alarm anyone and believed his conduct to be fully compliant with open-carry requirements.

Given the fact that properly-licensed Texans may lawfully openly carry a firearm in a hip or shoulder holster and this activity may frequently alarm a reasonable person, using "likely" as the definition for "calculated" in the disorderly-conduct statute also presents a possible vagueness issue because the statute then fails to identify any dividing line between

lawful conduct and unlawful conduct. *See Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983) (finding that a statute is vague if it "fails to draw reasonably clear lines between lawful and unlawful conduct," "fail[s] to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful manner," or encourages "arbitrary and discriminatory enforcement"). Our Texas License-To-Carry holders deserve clarity to know that they may openly carry in a holster without fear of being arrested for disorderly conduct.

Thus, to uphold legislative intent and avoid a collision course between the disorderly-conduct statute and Texas's open-carry law, I would hold that "calculated" as used in the disorderly-conduct statute means "deliberately planned" or "planned or contrived to accomplish a purpose." Moreover, I would hold that the reasonable-person standard does not apply. Instead, I would assign the actor's subjective intent to determine whether by the display of a firearm the actor intended to alarm a target audience. The State would have to prove, and a judge or jury would have to find, that the actor who was lawfully openly carrying a gun in a hip or shoulder holster did so with a deliberate plan to alarm a target audience. This definition drastically decreases the likelihood that a person lawfully openly carrying a weapon could be convicted of disorderly conduct.[8] This interpretation also renders

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[8] Two intermediate appellate courts, called upon to interpret the disorderly-conduct statute, have adopted an interpretation of the word "calculated" similar to the one that I have suggested above. *See Ex parte Poe*, 491 S.W.3d 348, 354 (Tex. App.—Beaumont 2016, pet. ref'd); *Lovett v. State*, 523 S.W.3d 342, 347 (Tex. App.—Fort Worth 2017, pet. ref'd). In both cases, the individuals charged with disorderly conduct asserted that they believed their conduct in openly carrying firearms was lawful and that they harbored no intent to cause public alarm. *See Poe,* 491 S.W.3d at 352-53 (defendant charged for openly carrying long gun in shopping mall as display of Second Amendment rights); *Lovett,* 523 S.W.3d at 344-45 (defendant charged for openly carrying antique handgun while

the statute less susceptible to a vagueness challenge, for it would condition criminal liability on the actor's subjective intent to cause alarm through his conduct.[9]

B. The Court's opinion fails to garner a majority vote that would protect legal open carry.

The Court's opinion in Section III-B seems to create a rule that openly carrying a weapon, without more, can never satisfy the elements of disorderly conduct. But that section of the Court's opinion is merely a plurality with only four judges joining that section. While I support creating a bright-line rule that lawful open carry can never amount to disorderly conduct, with only a plurality vote, that section of the Court's opinion has no precedential value. Law enforcement, prosecutors, and courts can feel free to ignore that section. They can proceed with charging, trying, and convicting individuals for disorderly conduct who are lawfully openly carrying a holstered gun if they believe that the actor did so in a manner "likely" to frighten a reasonable person. Thus, an actor lawfully openly carrying a holstered

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filming police officers during a traffic stop). Thus, to the extent it is suggested that the conflict between the open-carry law and the disorderly-conduct statute is merely a theoretical problem and that open-carry rights will not be affected by the Court's holding, these cases suggest otherwise. I further agree with the observation of the court of appeals in *Lovett* that "[c]ertainly . . . the mere presence of a firearm or deadly weapon in public cannot possibly supply the requisite mens rea for a disorderly-conduct conviction, or else anyone participating in Texas's embrace of lawful open carry would be guilty the moment he stepped outside his home visibly armed." *Lovett*, 523 S.W.3d at 348. Although the Court's opinion agrees with this sentiment in principle, it is difficult to see how its approach, in practice, will not infringe upon the lawful right to openly carry firearms in Texas.

[9] *See Colten v. Kentucky,* 407 U.S. 104, 108-10 (1972) (upholding Kentucky disorderly-conduct statute over vagueness challenge; where statute required proof of a person's subjective "intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof," statute was not impermissibly vague because "citizens who desire to obey the statute will have no difficulty in understanding it") (citations omitted).

weapon walking down the street next to an anti-gun violence rally could be arrested, charged, and convicted of disorderly conduct because he knew that it was likely that the reasonable people around him would be frightened at the sight of his gun. The portion of the Court's opinion that garners a majority vote does not help to resolve this issue. The Court's opinion thus leaves open the strong possibility that those engaged in lawful open carry will be subject to prosecution under the disorderly-conduct statute.

III. Conclusion

Choosing between these two possible interpretations of the disorderly-conduct statute implicates significant constitutional and policy considerations. Under the Court's interpretation, as explained above, the statute conflicts with open-carry rights and poses a potential vagueness problem because it fails to draw a reasonably definite line between the lawful conduct of openly carrying a firearm in public and the unlawful conduct of displaying a firearm in a manner that the actor knows is likely to cause alarm. As a result of this holding, licensed handgun owners may avoid exercising their rights to open carry for fear that they will be prosecuted for doing so in a manner that they know may cause alarm to ordinary bystanders, even if they lacked any intent to do so. But under the interpretation I propose, the statute more readily passes constitutional muster because it conditions criminal liability on proof of the actor's subjective intent to cause public alarm through his conduct. Under my interpretation, there would be no conflict between the disorderly-conduct statute and the open-carry law. Defendants would be fairly placed on notice that they may not

exercise their rights to open carry while doing so in a manner that they have subjectively calculated or planned to cause public fear or alarm. Because I view my proposed interpretation as being required to avoid a conflict with the open-carry law, and because this Court is obligated, whenever possible, to construe statutes in a manner that avoids grave constitutional concerns, I would hold that this construction of the statute is the proper one.

For the foregoing reasons, to the extent that the issue is properly before the Court, I would hold that the disorderly-conduct statute requires proof of more than a defendant's mere awareness that the manner in which he displays a firearm in public is likely to alarm an ordinary person. Rather, I would hold that the statute requires proof that a defendant carried his firearm in a manner that he has deliberately planned ("calculated") to cause alarm to bystanders. In any event, because neither Appellee nor the trial-court judge who dismissed the information in this case had the benefit of any statutory interpretation by this Court with respect to the proper meaning of the ambiguous terms in the disorderly-conduct statute, I would uphold the ruling dismissing the information due to lack of adequate notice. I, therefore, join Judge Walker and respectfully dissent from the Court's judgment reversing the dismissal of the information.

Filed: May 15, 2019

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